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RPC Backgrounder

Comp-Time and Flex-Time: Giving Employees a Say

Executive Summary

- In his FY 2006 budget blueprint, President Bush calls on Congress to "give private-sector workers the same flexible scheduling options that Federal employees now enjoy" in the forms of "comp-time" and "flex-time." Offering workers such choices as whether to receive overtime pay as cash or as paid time off will, as the President noted, "help workers successfully juggle the demands of the workplace with the needs of their families."

- Comp-time (compensatory time off) lets employees choose paid time off instead of overtime pay. A worker who elects comp-time and works overtime is entitled to 1.5 hours off for every hour of overtime worked.

- Flex-time would permit an employee to "flex" his or her schedule over a two-week pay period, by scheduling more than 40 hours of work in one week, and then scheduling comparably fewer hours in the following week. For example, an employee might request to work 48 hours one week to offset a paid day off during the following week.

- The Fair Labor Standards Act (FLSA) restricts the options available to private-sector employers and employees to address workplace flexibility needs. Most private-sector workers employed on an hourly, rather than a salaried, basis are covered by the requirements of the FLSA. Covered workers must be paid overtime wages at a rate of time-and-a-half for each hour worked above 40 in a single workweek. FLSA-covered workers are not permitted to choose to receive their overtime pay in the form of compensatory time. In other words, those workers who would prefer paid time off instead of overtime pay are *denied* that option.

- Meanwhile, public-sector workers have long benefited from comp-time and flex-time options (federal workers since 1978 and the rest since 1985). According to the most recent survey on employees' use of flexible scheduling, conducted in 2001, 34 percent of federal employees and 30 percent of state employees have taken advantage of workplace flexibility.

- Although many public-sector union members enjoy the benefits of comp-time and flex-time, union leaders strongly oppose these worker benefits for private-sector employees, arguing that they dilute workers' rights to receive time-and-a-half pay for hours worked over 40 in a workweek.

Introduction

Today's workforce has changed dramatically over the last 50 years, but the federal wage-and-hour law has not kept up. More two-parent families are working now than ever before. In fact, for nearly two-thirds of two-parent families with children, both parents are in the workforce.[1] These working parents seek greater flexibility to help them successfully juggle the demands of the workplace with the needs of their families. Other workers, such as those with ailing parents, also seek work flexibility.

In his FY 2006 budget submission to Congress, President Bush called on Congress to provide private-sector workers with the same workplace flexibility that long has been provided to federal and state government employees. Specifically, he called for offering workers "comp-time" and "flex-time" options. Comp-time, or paid time off instead of overtime pay, would be provided at the same rate as overtime pay: one and one-half hours of time off for each overtime hour worked. Flex-time would give employees the option to work more than 40 hours in one week and then work comparably fewer hours in the subsequent week.

Employers who wish to accommodate the needs of their workers may find the law standing in the way. The Fair Labor Standards Act of 1938 (FLSA) – which provides the national standards for wages and hours worked for millions of private-sector employees – prohibits substituting time for cash for private-sector employees covered by the law. This means that granting greater flexibility to those workers can be obtained only by amending the law.

For 20 years, Republicans have been trying to provide comp-time and have been unsuccessful. This is largely due to the vociferous opposition of organized labor, which claims that workers will be exploited by their employers if the law were to be amended.

Past legislation has addressed organized labor's concerns by including safeguards that assure that the choice of accepting comp-time is the employee's. It also has provisions to honor collective bargaining agreements. However, the question of employee satisfaction with these benefits has been answered. Because comp-time and flex-time arrangements already are available to federal, state, and local government employees, Congress can look to those employees' experience to help assure the change in law will benefit both employer and employee.

Background

Because the needs of today's workforce have changed so dramatically, the need for flexibility has never been greater. In today's workforce, more two-parent families are working than ever before: 61 percent of two-parent families with children have both parents in the workforce.[2] Conversely, when the FLSA was enacted in 1938, 67 percent of households were "traditional," defined as having a stay-at-home mother and a father in the workforce.[3] In 2003, the labor force participation rate was 71 percent for mothers with children under age 18.[4]

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[1] Bureau of Labor Statistics (BLS), "Employment Characteristics of Families in 2003," April 20, 2004.
[2] The Wall Street Journal, "9-to-5, R.I.P," August 19, 2004.
[3] The Wall Street Journal.
[4] BLS.

Working parents and non-parents alike seek greater flexibility in the workplace. Many employees find themselves becoming caregivers for aging family members and other loved ones. According to the National Family Caregivers Association, more than 50 million people provide care for a chronically ill, disabled, or aged family member or friend during any given year.[5] Among caregivers, it is estimated that 64 percent were employed either full- or part-time according to a 2001 report.[6]

Another group of workers is especially in need of increased flexibility – those in the so-called "sandwich generation," that is, those individuals who care for both an elderly family member and children at the same time.[7] A Portland State University study examining workers in the "sandwich generation" found that among households with one or more persons aged 30 to 60, between 9 and 13 percent were dual-earner sandwich-generation couples. This phenomenon is anticipated to grow as the baby boom generation moves into the retirement age. In 1990, 31.2 million Americans were over 65 or older – nearly 13 percent of the population. It is projected that by 2030, 47.5 million Americans will be 65 or older, many of them living well past the age of 75.[8] Clearly, the need for workplace flexibility will only increase.

Support for Workplace Flexibility

Survey data indicate workers are increasingly asking for greater flexibility in their schedules. According to a 2003 survey by the staffing company OfficeTeam, one-third of workers surveyed indicated greater flexibility in their schedule would result in more job satisfaction.[9]

The desire for workplace flexibility even edges out the desire for job advancement, according to a survey of employees by the group Roper Starch Worldwide. According to the survey, 51 percent of employees prefer a job that offers flexible hours over one that offers an opportunity for advancement. The survey also found that 51 percent of those questioned would stay in their current position rather than switch if their employers offered flexible working hours.[10]

A 1995 Penn & Schoen survey illustrates the tremendous support for comp-time specifically. Of those surveyed, 75 percent favored a proposal that would allow hourly workers to choose whether to take their time-and-a-half overtime compensation in the form of wages or time off; further, 81 percent of women surveyed supported comp-time.[11] At the time the survey was conducted, Penn & Schoen was the pollster for the Democratic National Committee and former

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[5] National Family Caregivers Association, "Who are Family Caregivers?" http://www.thefamilycaregiver.org/who/stats.cfm#4, February 15, 2005.
[6] Ed Potter, "The Balancing Act: Working Caregivers Show Need for Workplace Flexibility," Employee Policy Foundation, July 24, 2003.
[7] Potter.
[8] Potter.
[9] Office Team, "The Keys to Happiness at Work", http://www.officeteam.com/PressRoom?LOBName=OT&releaseid=365, August 5, 2003. Note: This survey was conducted for OfficeTeam by an independent research firm. The survey included over 600 responses from employed men and women, age 18 and older.
[10] Evan Cooper, "The Power of Flexibility," www.morebusiness.com, 2000. Note: This survey was done for Randstad North American, a large employment firm. It assessed the views of 6,000 American and Canadian workers.
[11] Employment Policy Foundation, "E-mail Trends: Changing Family Structure Demands Workplace Flexibility," http://www.epf.org/pubs/newsletters/1997/et970404.asp, April 4, 1997.

President Clinton. Those studying this issue continue to point to this survey to demonstrate comp-time's broad appeal.

A more recent poll shows some workers would even take the time over the pay if it were merely an equivalent amount, rather than time-and-a-half. Salary.com, a provider of employee compensation data, found that 39 percent of workers indicated that, if given the choice, "they would choose time off over the *equivalent* in additional base salary" (emphasis added).[12] The survey results show that the desire for time off is up nearly 20 percent from a similar poll taken three years ago. And because this survey question gave only the choice of an "equivalent" amount of time off, it is reasonable to suggest that more respondents would have favored the choice if offered one-and-a-half hours for each hour of overtime worked.

Federal Comp-Time Program

In 1975, the Office of Personal Management (OPM) initiated a study on the feasibility of implementing flex-time within the federal government. At the same time, independent from the OPM study, other agencies were beginning to implement their own flex-time programs in response to employee interest. The OPM taskforce found increased productivity, improved morale, reduced tardiness, and a decrease in the use of sick leave among federal employees following the implementation of flex-time programs.[13] Subsequently, in 1978, Congress passed the Federal Employees Flexible and Compressed Work Schedules Act. This Act allowed federal employees the choice of comp-time (but at a one-to-one ratio for hours worked).[14] Comp-time was extended to state and local government employees in 1985. That law also established that comp-time pay be at the rate of one-and-a-half hours for each hour of overtime worked.[15]

According to the most recent survey on employees' use of flexible scheduling, conducted in 2001, 34 percent of federal employees and 30 percent of state employees had taken advantage of workplace flexibility.[16] Clearly, workplace flexibility is a useful benefit for thousands of government workers.

Need to Amend the Fair Labor Standards Act

Many employers want to accommodate the needs of their workers.[17] However, the Fair Labor Standards Act (FLSA) restricts the options available to them. Most workers employed on an

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[12] Tim Driver, "Time Off From Work Gains in Importance," www.salary.com, January 12, 2005.
[13] Simcha Ronen, "Flexible Working Hours: An Innovation in the Quality of Work Life," McGraw-Hill, 1981.
[14] D. Mark Wilson, "Modernizing the Fair Labor Standards Act for the 21st Century," The Heritage Foundation, July 12, 2001.
[15] U.S. Department of Labor, "History of Changes to the Minimum Wage," http://www.dol.gov/esa/minwage/coverage.htm, January 24, 2005. Note: These changes were made by Congress in 1985 following the U.S. Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority, et. al.* which reapplied the FLSA to state and local governments. The *Garcia* decision reversed the 1976 ruling in *National League of Cities vs. Usery*, which held that the minimum wage and overtime provisions of the FLSA did not apply to state and local government workers engaged in traditional government functions.
[16] The White House, "America's Workforce: Ready for the 21st Century," August 5, 2004.
[17] See, for example, USA Today, "Working 9-to-5," December 6, 2004.

hourly, rather than a salaried, basis are covered by the requirements of the FLSA.[18] The FLSA requires covered (i.e., non-exempt) workers to be paid overtime wages at a rate of time-and-a-half for each hour worked above 40 in a single workweek. Currently, covered employees are not permitted to choose to receive their overtime pay in the form of compensatory time. In other words, workers covered by the FLSA who would prefer paid time off instead of overtime pay are *denied* that option. Meanwhile, salaried white-collar workers who are exempt from the FLSA are free to negotiate flexible schedules with their employers.

Senate Legislative History

The debate over flexible scheduling is not a new one. Legislation allowing comp-time was first introduced in the mid 1980s. By the early 1990s, a coalition of individuals and businesses formed to urge Congress to modernize the FLSA to allow comp-time. During the 104th Congress (1995-96), several bills providing comp-time were introduced, including S. 1129 by then Senator John Ashcroft.[19] That bill also contained provisions to permit flex-time. Although hearings were held on the Ashcroft bill, the Senate never voted on the proposal. Comp-time legislation was introduced again in the 105th, 106th, 107th, and 108th Congresses. Early in the 105th Congress, in his 1997 State of the Union Address, President Clinton endorsed comp-time and flex-time. Even so, his party prevented passage of S. 4 that year (it failed to pass after two failed cloture votes).[20]

In the last Congress, as HELP Committee Chairman, Senator Judd Gregg introduced legislation (S. 317) in the form of a broad proposal including comp-time, flex-time, and several work-hours-related provisions. The bill was not reported to the full Senate, in part because the House did not pass its comp-time bill. House Republican leaders pointed to the aggressive opposition of organized labor that prevented the passage of the bill.[21]

Summary of the Gregg Proposal

Senator Gregg's bill in the 108th Congress, the Family Time and Workplace Flexibility Act (S. 317), would have permitted private-sector employees to elect comp-time at a rate of not less than one-and-a-half hours for each overtime hour worked, and it also would have permitted flex-time. The employer would have the option of offering or not offering these benefits to employees. Because this bill meets the goals established by President Bush, the following is a quick review of its notable provisions:

- *Employee/Employer Written Agreement* – For employees not covered by a collective bargaining agreement, a written agreement accepting comp-time must be reached voluntarily between the employee and employer before the performance of overtime work. An employee may elect to receive comp-time or overtime wages for each workweek.

[18] Private-sector workers who are paid on a salary basis, meet a specified salary level, and are employed "in a bona fide executive, administrative, professional, outside sales or computer" position are exempt from the FLSA and its overtime requirement. Most other private-sector employees are covered.
[19] Congressional Research Service, "Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act?" July 12, 2004, pg. 6.
[20] S. 4 was the Family Friendly Workplace Act introduced by Senator John Ashcroft.
[21] Daily Labor Report, "Supporters Vow to Continue Fighting to Pass Proposal to Revise Comp Time," Bureau of National Affairs, June 6, 2003.

- *Limit on Comp Hours* – An employee may accrue no more than 160 hours of comp-time.

- *Cashing Out* – On January 31 of each calendar year (or a different designated 12-month period), the employer must cash out all unused comp-time (in the form of time-and-one-half overtime pay) not used prior to December 31. The employer may also cash out accrued comp-time in excess of 80 hours at any time after giving the employee at least 30 days notice.

- *Employee Opt-Out* – An employee may withdraw from the written agreement at any time by submitting a written notice to the employer. An employee may request monetary compensation for all accrued comp-time at any time. The employer must pay for all accrued hours within 30 days of receiving such a request.

- *Employer Opt-Out* – An employer may discontinue the comp-time policy after providing 30 days written notice to those employees who have a comp-time agreement.

- *Use of Comp-Time* – An employee who requests to use comp-time must be permitted to do so within a reasonable period of time after making a request, provided the use of comp-time does not unduly disrupt the operations of the employer.

- *Bankruptcy Protection* – The bill also includes a bankruptcy provision that gives employees special status to recover wages for accrued comp-time in the event the business fails.

- *Protection for Part-time Workers* – The bill allows the option of comp-time and flex-time to employers and employees for workers who have been employed by the employer for at least 12 months, and for at least 1,250 hours of service with the employer in the prior 12-month period.

- *Other Employee Protections* – Employers shall not directly or indirectly intimidate, threaten, or coerce an employee to elect comp-time in lieu of overtime pay. The agreement to receive comp-time in lieu of cash wages must not be a condition of employment.

- *Remedies and Sanctions* – The bill provides sanctions for an unscrupulous employer. If an employer coerces an employee to elect comp-time instead of cash overtime wages, in addition to the existing FLSA remedies for overtime violations (back wages for overtime pay underpayments and an equal amount as liquidated damages), the employer is also liable for the cash equivalent of the comp-time accrued illegally (less the amount of comp-time used by the employee), plus an amount equal to the cash equivalent of the comp-time accrued illegally as liquidated damages. This amounts to <u>quadruple</u> damages.

- *Flex-Time* – The bill's flex-time provision would allow an employer to establish biweekly work programs that consist of not more than 80 hours over a two-week period, in which up to 10 hours may be shifted between the two weeks. That is, the employee could work 50 hours in week one and then work 30 hours in week two. The bill provides the same employee protection provisions for those taking flex-time as it does for those who take the

comp-time option. Consistent with the FLSA, employees covered by the flex-time program would receive time-and-a-half (in cash or comp-time) for hours worked in excess of the biweekly work schedule or in excess of 80 hours in the two-week period that are requested in advance by the employee.[22]

Myths and Facts About Comp-Time/Flex-Time

A vocal minority, led by labor leaders, opposes offering the flexible work schedule choices of comp-time and flex-time to private-sector workers. Below are some of the common arguments used to oppose workplace flexibility and the reasons why these arguments are wrong or misleading.

Myth – Comp-Time/Flex-Time is Another Way to Take Away Overtime Pay: In a written statement, the President of the AFL-CIO asserted that flex-time and comp-time are "really about giving America's corporations the flexibility to cheat their workers out of overtime pay after 40 hours a week."[23] According to a recent AFL-CIO response to the President's proposal, enactment of comp-time legislation would permit employers to subtly — or not so subtly — coerce workers into surrendering cash for comp-time.[24]

Facts: Last year, labor unions attempted to blur the issue of comp-time/flex-time by tying it to the Administration's revisions to the white-collar overtime pay regulation. The updated regulation clarified who is exempt from overtime and minimum wage. If an employee is exempt from the white-collar overtime regulations, she does not qualify for overtime pay – and so may already negotiate flexibility arrangements with her employer. Conversely, the employer may pay her for overtime hours even if she is exempt.

Meanwhile, for employees covered by the FLSA, their overtime rights would be protected under comp-time and flex-time. The difference is that employees could *choose* between time-and-a-half in cash or time-and-a-half in paid time off. The employee could at any time withdraw from his or her agreement to receive comp-time and return to overtime pay. The employer would be required to cash out any accrued comp-time within 30 days of receiving an employee's notice to end the comp-time agreement. As to coercion specifically, the Gregg bill of the 108th Congress would prohibit: 1) accepting comp-time in lieu of overtime as a condition of employment or working overtime; and 2) the direct or indirect intimidation of an employee or coercion by an employer in favor of comp-time in lieu of overtime pay. Employers violating this are subject to quadruple damages. It is unlikely any bill coming before the Senate this year would provide less protection.

Additionally, collective bargaining agreements would continue to take priority in cases where employees are represented by a union. It is notable that a number of collective bargaining agreements provide a comp-time or flex-time option for union members. Interestingly, the American Federation of State, County, and Municipal Employees' "collective bargaining toolkit"

[22] Congressional Research Service.
[23] Statement of AFL-CIO President John Sweeney on President Bush's "Flextime" Proposal, AFL-CIO, August 5, 2004.
[24] AFL-CIO, "Bush, Republican Allies Prepare New Attack on Workers' Overtime Pay," January 7, 2005.

provides union negotiators a checklist that contains "compensatory time off" and "flex-time" for use in collective bargaining agreements.[25]

Myth – Comp-Time Allows Employers to Work Employees More Than 40 Hours a Week Without Any Additional Cost: The liberal Employment Policy Institute (EPI) points to the FLSA as the only enforcement mechanism for the 40-hour workweek and its requirement that employers pay time-and-a-half for each hour worked beyond 40 in a week. It charges that comp-time would allow employers to delay paying any wages for overtime work for as long as 13 months.[26] Organized labor charges that the "Bush proposal takes away corporation's one big disincentive against having their employees work excessive hours—a time-and-a-half cash premium."[27]

Facts: Comp-time legislation in no way affects the 40-hour workweek contained in the Fair Labor Standards Act. Under comp-time proposals, each hour worked beyond 40 hours in a workweek is compensated at the rate of one-and-a-half hours. Flex-time, too, is still centered on the 40-hour standard. It just allows workers to better manage their time over an extended pay period. The President's proposal would give the employer the choice of whether or not to offer "flex-time" – but it would be the employee's choice of whether to accept that offer on any given occasion.

For comp-time and flex-time, the President calls for employee protections, like those in the Gregg bill. Chief among them is the condition that employees be the ones to choose – in writing – whether or not to accrue comp-time, and have the option at any time to discontinue it.

Myth – Comp-Time is Too Risky to Allow in the Private Sector: EPI criticizes comp-time as being too risky to make available to the private sector. It argues that workplace flexibility works in the public sector because employees can't be fired except for good cause, and that public-sector workers are not at risk of their employers going bankrupt.[28]

Fact: Comp-time and flex-time are chosen at the employee's discretion. Enforcement against any prohibited employer coercion would fall to the Department of Labor, as is the case with all FLSA provisions. In addition, the FLSA allows for a private-right-of-action if employees choose to exercise this option. As previously noted, concerns of employer coercion have been adequately addressed legislatively with the worker-protection provisions. Regarding bankruptcy, the Gregg proposal from the 108th Congress provided special status to workers to recover the cash equivalent for accrued comp-time in the event of an employer's bankruptcy. The bankruptcy protection is consistent with the Administration's goal of passing comp-time legislation that contains necessary employee protections.

Conclusion

The workforce is not the same as it was in 1938 when the Fair Labor Standards Act was enacted. Because so many of today's workers are also parents of dependent children or caretakers

[25] "A Checklist of Contractor Clauses: A Guide for AFSCME Negotiators," http://www.afscme.org/wrkplace/cbcheck1.htm , February 1, 2005.
[26] Ross Eisenbrey, "The Naked Truth About Comp Time," EPI Issue Brief, March 31, 2003.
[27] Statement of AFL-CIO President John Sweeney.
[28] Eisenbrey.

of dependent adults, flexibility in the workweek is a widely sought benefit. Comp-time and flex-time are tools that the President urges Congress to adopt in order to help employers and employees alike. These options are well established: thousands of public-sector employees take advantage of them today. They are fair: they honor the longtime principle of the 40-hour workweek and time-and-a-half-pay for overtime.